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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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In re Applications of	)	MM Docket No. 93-241
	)	
DARRELL BRYAN	)	File No. BPH-920109MA
	)	
SBH PROPERTIES, INC.	)	File No. BPH-920123MD
	)	
	)	
For Construction Permit for		
New FM Channel 276A		
Tusculum, Tennessee		

To: Honorable John M. Frysiak  
Administrative Law Judge

REPLY TO  
OPPOSITION TO SUPPLEMENT TO PETITION TO ENLARGE ISSUES

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January 10, 1994

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## SUMMARY

Bryan, as is his custom, attempts to place the blame for WSMG's failure to make its public inspection file available to William Seaver on everyone but himself. His attempt to place blame upon SBH is clearly without merit, as is his attempt to make WSMG employee, Connie Ms. Thompson, his scapegoat.

Bryan's contention that WSMG's failure to make its public inspection file available resulted solely from Ms. Thompson's "mistaken impression" and "not on any direct order of Mr. Bryan" is unsupported by the Declaration of Ms. Thompson. Ms. Thompson never in any manner disputes or denies that she told Mr. Seaver that the reason she was denying him access to the public file was that she had been expressly ordered by Bryan not to permit anyone to review the public file, unless he was present at the station. More importantly, she has never denied that Bryan gave her precisely that order. While she now indicates that her "impression" of Bryan's intentions was "mistaken," she identifies no basis for that conclusion, other than what she has been told by Bryan after the fact. Furthermore, even Bryan acknowledges that he gave an order, significantly similar in content to the one identified by Ms. Thompson in her conversation with Mr. Seaver. Thus, it must be concluded that Ms. Thompson acted on an express order of Bryan in denying access to the public file and that he had a motive for giving such an order, or at minimum, that a substantial and material question exists in this regard. Accordingly, the requested issues should be added.

02/10/94

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REPLY TO  
OPPOSITION TO SUPPLEMENT TO PETITION TO ENLARGE ISSUES

SBH Properties, Inc. ("SBH") by counsel herewith submits its  
Reply to the Opposition to Supplement to Petition to Enlarge  
Issues, filed by Darrell Bryan ("Bryan") on December 28, 1993,  
1/ as follows:

1. In its Supplement to its previously filed Petition to  
Enlarge Issues and Threshold Showing of Unusually Poor Broadcast  
Record, SBH requested the addition of issues relating to the  
failure of WSMG(AM), under Bryan's ownership and operation, to  
make the station's local public inspection file available for  
public inspection, during regular business hours. This request

1. As indicated in his "Request for Leave to File Late,"  
Bryan's Opposition was due to be filed on December 23, 1993, but  
was submitted two business days late, due to a miscalculation of  
the due date by counsel. SBH does not interpose any objection to  
the acceptance of Bryan's Opposition under these circumstances.

was premised upon facts arising out of William Seaver's attempt to review the station's public inspection file on December 3, 1993, as a part of SBH's efforts in preparing its Reply to Bryan's Opposition to Petition to Enlarge Issues and Threshold Showing.

2. In a Declaration submitted in support of Bryan's Opposition, Connie Thompson, the employee of WSMG who was on duty at the time of Mr. Seaver's visit, readily acknowledges that she refused his request to review the station's public file, based on her belief that Bryan did not want anyone looking at the file in his absence. While Ms. Thompson now indicates that her impression that Bryan "didn't want anyone looking at the file unless he was present" was "mistaken," she does not deny that it was and had been her impression up to and including the time of Mr. Seaver's visit nor does she explain how she came to hold that impression nor identify the source of the purported "mistake."

2/ Ms. Thompson does not in any manner dispute or deny Mr. Seaver's contention that she told him that the reason she was denying him access to the public file was that she had been expressly ordered by Bryan not to permit anyone to review the public file, unless he was present at the station. Likewise, Ms. Thompson confirms Mr. Seaver's contention that she advised him that Mr. Bryan was not at the station and that she did not know

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2. It is of course clear that the only basis she has for her present belief that her former "impression" was "mistaken" is what she has been told by Bryan, after the fact.

where he was. While she does not address Mr. Seaver's contention that she also advised him that she did not know how to contact Bryan, Ms. Thompson does acknowledge that she made no effort to contact Bryan until after Mr. Seaver had left.

3. It comes as no surprise that Bryan denies that he told Ms. Thompson "to deny access to the file if I was not at the station," since a rule violation based on his explicit order would likely lead to his disqualification in this proceeding. However, he does acknowledge in his December 17, 1993 Declaration that he told Ms. Thompson that he "wanted to be informed immediately if anyone wanted to inspect the file so that I could come out of my office and personally handle the matter." Bryan does not claim that he gave Ms. Thompson any specific instructions regarding how she was to comply with this order if he were out of the office. One thing is certain, however, if he gave her any instructions in that regard, they were inadequate.

4. In his Opposition Bryan, as is his custom, attempts to place the blame on everyone but himself. Thus, in addition to attempting to make Ms. Thompson the scapegoat, he also blames SBH. In this regard Bryan contends that: (a) Ms. Thompson had given David Murray access to the stations operating logs, (b) the public file was in "disarray" after Murray reviewed it, (c) Mr. Seaver did not review certain "letters" which Ms. Thompson offered to show him, (d) Mr. Seaver did not wait 45 minutes for Bryan to return and (e) Mr. Seaver did not return Kathy Knight's telephone call.

5. There was nothing illegal or improper about Ms. Thompson giving Mr. Murray access to the station's operating logs, nor is the fact that she did so relevant, here, inasmuch as Bryan acknowledges that, after Murray's visit, he advised Ms. Thompson and other staff members that no one was to be given access the station's logs other than the FCC. That order was sufficient to address the problem of providing access to logs and leaves no basis to justify his further order that the public file was not to be made available in his absence.

6. Bryan's contention that the public file was in disarray after Murray's visit is ludicrous. WSMG's public file was in a serious state of disarray when Murray arrived at the station, inasmuch as all of the required issues/programs lists for the periods from October, 1986 through December, 1990, July through December, 1991 and July through December, 1992, representing a total of 21 quarters, were missing from the file and unavailable for review, a fact which Bryan has not adequately explained. <sup>3</sup>/

7. Bryan's contention that, had Mr. Seaver bothered to review the "letters" which Ms. Thompson proffered, he would have had access to the issues/ programs lists is utter nonsense. As indicated in Mr. Seaver's attached Declaration, while Ms. Thompson did offer to let him review what she identified as "letters received from listeners," she did not offer to let him

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3. Indeed, in his December 17, 1993 Declaration Bryan offers yet another conflicting explanation: that "portions of the file were being reorganized." (emphasis added)

look in any file "drawer" nor did he have any basis, whatsoever, for believing that by agreeing to review such letters he would have been given access to the quarterly issues/programs lists he was interested in reviewing, which were required to be in the public file and required to be made available at his mere request. Nor is there any merit to Bryan's contention that, because the letters are purportedly located behind the issues/programs lists, Mr. Seaver would have had access to them had he looked at the letters. Given Ms. Thompson's adamant refusal to allow Mr. Seaver to review the public file, she most certainly would have removed the letters from the file drawer in question, herself, prior to letting Mr. Seaver inspect them, as she had done during Mr. Murray's visit (See: Exhibit C to SBH's Reply to Opposition to Petition to Enlarge Issues and Threshold Showing).

8. With regard to Bryan's contention that Mr. Seaver did not wait 45 minutes to see if Bryan would return, as indicated in Mr. Seaver's attached Declaration, contrary to Ms. Thompson's contention, she did not advise him that Bryan would return at 10:00 AM. On the contrary, Mr. Seaver received the clear impression that Bryan most likely would not return until around noon. Indeed, other evidence suggests that he in fact did not return until just prior to noon. Thus, while giving no indication regarding when he returned to the station, Bryan does acknowledge that he immediately sought to contact Seaver by having Kathy Knight place a phone call to Seaver's mother.

However, as indicated in Mr. Seaver's attached Declaration, that call was made immediately prior to his return to his mother's house, shortly after noon. Thus, if what Bryan says is true, he did not actually return to the station until just prior to noon. Furthermore, although Ms. Thompson contends that she attempted to reach Mr. Bryan on his car phone after Mr. Seaver left the station, she made no offer or attempt to reach Bryan by phone or otherwise while Seaver was present and in fact explicitly told him that she had no way to contact Bryan. Thus, Seaver had no basis for believing that he would have any opportunity to review the public file until at least noon and his schedule did not permit him to return to the station at that time.

9. With regard to Bryan's contention that Mr. Seaver did not return Kathy Knight's telephone call, as indicated in Mr. Seaver's attached Declaration, he did not return that call because it was not possible for him to return to the station at that time or later in the day, because he had to leave town to return to Florida, where he had a prior business commitment the following day.

10. Bryan contends (at para. 5) that it is clear from Connie Thompson's Declaration that her refusal to provide Mr. Seaver access to WSMG's public file was "based on her 'mistaken impression' and not on any direct order of Mr. Bryan." On the contrary, Ms. Thompson's Declaration establishes nothing of the sort. As reflected above, Ms. Thompson has never in any manner disputed or denied Mr. Seaver's contention that she told him that



the reason she was denying him access to the public file was that she had been expressly ordered by Bryan not to permit anyone to review the public file, unless he was present at the station. Nor has she ever denied being given precisely that order. While she now indicates that her "impression" of Bryan's intentions was "mistaken," she identifies no basis for that conclusion, other than what she has been told by Bryan after the fact. Furthermore, even Bryan acknowledges in his self-serving Declaration that he gave an order, significantly similar in content to the one identified by Ms. Thompson in her conversation with Mr. Seaver. Thus, based upon the evidence at hand, it must be concluded that Ms. Thompson acted on an express order of Bryan in denying access to the public file. If there was a mistake, it was Bryan's mistake in giving an improper order. That he had a motive for giving such an order is evident, inasmuch as his actions were motivated by the desire to control the information given to the public. 4/

11. Bryan's suggestion that no interested member of the public has been denied access to the station's public file, because Mr. Seaver is a competitor who was not actually interested in inspecting the file. Initially, Bryan points to no

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4. It is readily apparent that Bryan simply overreacted to the fact that Murray had been given access to WSMG's operating logs. While this violated no rule, the logs did reveal the station's noncompliance and resulted in Bryan's having to expend funds to repair the remote monitoring meters, which had not been properly calibrated for over a year, as well as to repair the transmitter, and ultimately to respond to a Petition to Enlarge.

provision of the Rules which exempts anyone from the "public" solely on the basis that they are competitors. Furthermore, Bryan has absolutely no basis for knowing whether or not Mr. Seaver seriously intended to review the station's public file, inasmuch as Ms. Thompson, acting on Bryan's express order, refused to give him access to the file.

12. Bryan contention (at para. 6) that there is no "pattern of refusing to provide access to the public file" and that an isolated incident "is not sufficient to warrant the addition of a public file issue" is without merit. Initially, Bryan has cited no precedent requiring the establishment of a pattern of public file violations as a prerequisite to the addition of an issue. Likewise, Bryan has advanced no evidence indicating that this is the sole instance in which WSMG has violated the Public File Rule nor provided evidence indicating compliance with the Rule on other occasions. It may be that no one other than Mr. Murray and Mr. Seaver have sought to review WSMG's public file. If so, it is clear that WSMG violated the Rule every time access was sought, by failing to make the required issues/programs lists available to Murray and denying Mr. Seaver any access to the file.

13. Finally, Bryan states in his Declaration that he is "puzzled" that Ms. Thompson would give Mr. Murray complete access to the public file, as well as operating logs that she was not required to make available, and then deny Mr. Seaver any access to the file. However, there is nothing puzzling about Ms. Thompson's conduct, whatsoever. When the circumstances are

considered it is clear that she acted in the first instance out of an attempt to assure station compliance with the requirement to make the public file available and simply provided access to more information than she was required to. In the second instance she was simply following Bryan's express order that she not make the public file available unless he was present. As such, she appears to be a model employee. Indeed, from what we have learned of Ms. Thompson in this proceeding to date, it can confidently be stated that she is far better qualified to be a licensee of the Commission than is Bryan. Thus, Bryan's flippant remark concerning Ms. Thompson's recent resignation ("I guess she realized that she really messed up") becomes all the more repulsive, demonstrating his impudence and brazen refusal to acknowledge the obvious fact that he, alone, is to blame.

14. Prior to receipt of Bryan's express order that the file was not to be made available in his absence, Ms. Thompson did precisely what the Commission's Rules require. This fact is underscored by the very significant change in Ms. Thompson's demeanor between Mr. Murray's visit and that of Mr. Seaver. Murray testified that Ms. Thompson had been "very congenial and helpful" during his visit and had made every effort to provide him with the entire public file immediately upon request (See: Exhibit C to SBH's Reply to Opposition to Petition to Enlarge Issues and Threshold Showing). In contrast, Mr. Seaver found that his request to review the station's public file visably caused Ms. Thompson her a great deal of stress, giving him the

clear impression that she fully understood what she was doing and that she recognized fully the conflict between the station's obligation to make the public file available and her personal obligation to follow to the letter the explicit instructions of her employer that it was not to be made available in his absence. What thanks did she receive for her loyal efforts? Bryan's flippant remarks and his attempt to make her the scapegoat for his flagrant disregard for the Commission's Rules. Once again, we have in the form of his latest Declaration vivid evidence from his own mouth of Bryan's cavalier attitude toward his obligation to comply with the Commission's Rules.

15. Consistent with the requirements for the enlargement of hearing issues, a dispute has been clearly and adequately alleged, it is factual and it rises to the level of a substantial and material issue. David Ortiz Radio Corp. v. FCC, 941 F.2d 1253, 1257 (D.C. Cir. 1991) With specific regard to materiality, it is well established that past conduct in the operation of a broadcast station is the best evidence of an applicant's future performance. Monroe Communications Corp. v. FCC, 900 F.2d 351, 353 (D.C. Cir. 1990) and cases cited therein. In that regard the Court has previously cautioned the Commission about failing to give adequate consideration to evidence of past conduct when proffered. Monroe Communications Corp., supra.; Central Florida

Enterprises, Inc. v. FCC, 638 F.2d 503, 510 (D.C. Cir. 1990) \_\_\_/

Here, SBH has demonstrated numerous violations of Commission Rules by WSMG under its ownership and operation by Bryan, as well as evidence that at least some of those violations occurred as a result of his direct orders. SBH submits that the evidence it has submitted of Bryan's past conduct demonstrates that he is not to be trusted with yet another Commission authorization. However, SBH does not have to meet a burden of proof at this juncture, but merely to establish a prima facie case, warranting enlargement of the issues to permit inquiry into Bryan's broadcast record and to determine whether WSMG has violated Commission Rules under his ownership and operation and the impact of those violations upon his qualifications, both basic and comparative. Having advanced a prima facie showing of noncompliance with numerous Commission Rules, which taken together constitute a threshold showing of an unusually poor broadcast record, the requested issues should be added.

WHEREFORE, the Petition to Enlarge Issues and Threshold Showing of Unusually Poor Broadcast Record, as supplemented,

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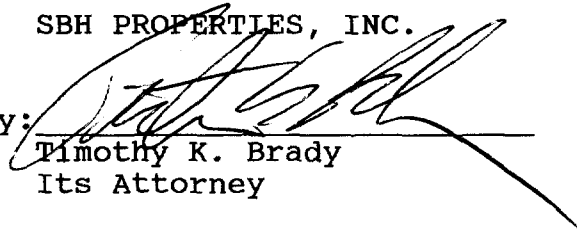
5. While these cases dealt with the Commission's grant of renewal expectancies in the face of what the Commission deemed minor violations, the principle enunciated by the Court is equally applicable here, where Bryan is an existing licensee.

should be GRANTED and the issues enlarged as requested.

Respectfully Submitted,

SBH PROPERTIES, INC.

By:

  
Timothy K. Brady  
Its Attorney

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January 10, 1994

## DECLARATION

I, William H. Seaver, do hereby certify that:

I have read the December 17, 1993 Declarations of Darrell Bryan and Connie Thompson, which were submitted by Bryan in support of his Opposition to Supplement to Motion to Enlarge Issues.

Ms. Thompson readily acknowledges that I asked to review the station's public file and that she refused to permit me to review it. She does not deny that she stated explicitly that she had been expressly advised by Darrell Bryan not to permit anyone to review the public file, unless he was present at the station, and that she advised me that Mr. Bryan was not at the station and that she did not know where he was.

Although Ms. Thompson contends that she attempted to reach Mr. Bryan on his car phone after I left, she made no offer or attempt to reach him by phone or otherwise while I was present at the station and in fact she explicitly told me that she had no way to contact him.

Contrary to Ms. Thompson's contention, she did not indicate that Mr. Bryan would return at 10:00 AM and the clear impression that I received was that Mr. Bryan most likely would not return until around noon.

While Ms. Thompson did offer to let me review copies of "letters," which she identified at the time as "letters received from listeners," she did not offer to let me look in any "drawer" nor did I have any basis for believing that in agreeing to review letters from station listeners I would have been given access to the quarterly issues/programs lists which were not contained in the public file at the time David Murray inspected the file on July 8, 1993. On the contrary, given Ms. Thompson's contention that she was acting upon express instructions from Mr. Bryan in refusing to make the public file available in his absence, I had no reason to believe that she would have given me access to the quarterly issues/programs lists, which were all that I was interested in reviewing.

During my brief conversation with Ms. Thompson on December 3, 1993, her demeanor reflected that my request to see the station's public file caused her a great deal of stress, giving me the clear impression that she fully understood the conflict between the station's obligation to make the public file available upon request and her personal obligation to follow to the letter the explicit instructions of her employer that it was not to be made available in his absence.

With regard to Mr. Bryan's contention that I did not return Kathy Knight's call to my mother's home, I did not return that call because, as I have previously indicated, it was not possible for me to return to the station later in the day, because I had to leave for Knoxville, where I was taking my mother, on my way



back to Florida, where I had a prior business commitment the following day.

Having been refused access to the public file and having been given no indication that Mr. Bryan would return and make the file available prior to noon, I decided to use the time I had remaining to make several stops before returning to my mother's home, prior to leaving town, around 12:30 PM. Upon returning to my mother's home shortly after noon, she told me that I had "just missed" a call from Kathy Knight, indicating that she had hung up the phone with Ms. Knight, just prior to my arrival.

I hereby certify under penalty of perjury that the above statement is true.

Signed and dated this 6 day of January, 1994.

  
WILLIAM H. SEAVER

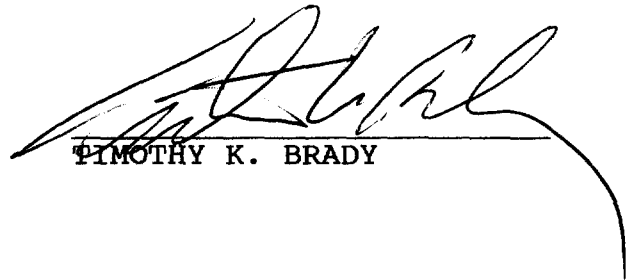
CERTIFICATE OF SERVICE

I, Timothy K. Brady, hereby certify that I have this 8th day of January, 1994, served a copy of the foregoing Reply to Opposition to Supplement to Petition to Enlarge Issues by First Class mail, postage prepaid upon the following:

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